August 24, 2010

Mr. Corbin Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Administrative File No. 2009-19

Dear Mr. Davis and Justices of the Court:

I write in support of the proposed amendments to court rules concerning the time periods for seeking appellate review. I support the versions which place the question of whether "excusable neglect" has been shown for late filings (late, but within the time for which late filings would be allowed on a showing of exclusable neglect) with the Court of Appeals rather than the trial court.

It is possible that the rest of the country is out of step, and Michigan has the matter right with its extremely generous time periods for seeking appellate review, but I doubt it in this case. The expeditious litigation of appeals strikes me as in everyone's interest, and while reasonable periods of time to allow a professional work product to be produced, and the various clients of the various litigants, civil and criminal, plaintiff and defense, well served, allowing *one year* for the show to even get on the road simply seems to me extraordinary; further, it causes incongruity in our system of review.

Our court rules include a provision in MCR 2.612 for "Relief From Judgment."

> **C) Grounds for Relief From Judgment.**
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> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
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> (a) Mistake, inadvertence, surprise, or excusable neglect.
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> (b) Newly discovered evidence which by due

diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
(d) The judgment is void.
(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
(f) Any other reason justifying relief from the operation of the judgment.

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.
(3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

Though my research has not been exhaustive, it appears that these provisions, in almost identical language, are common throughout the country (and as an aside, it was startling to me how many of them appear in "Rule 60" of the various states!). While a few set a shorter time limit for filing under the rule—Utah is three months, and Arizona, Colorado, and Nevada are six months, for example[1]—the overwhelming majority allow one year to file for relief from judgment on certain grounds, usually the same three delineated in the Michigan Rule.[2]

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[1] Utah Rules of Civil Procedure, Rule 60; Arizona Rules of Civil Procedure, Rule 60; Colorado Rules of Civil Procedure, Rule 60; Nevada Rules of Civil Procedure, Rule 60.

[2] See, for example, Alabama Rules of Civil Procedure, Rule 60; Alaska Rules of Civil Procedure, Rule 60; Arizona Rules of Criminal Procedure, Rule 60; Colorado Rules of Civil Procedure, Rule 60; Florida Rules of Civil Procedure, Rule 1.540; Hawaii Rules of Civil Procedure, Rule 60; Indiana Rules of Civil Procedure, Rule 60; Kentucky Rules of Civil Procedure, Rule 60.02; Main3 Rules of Civil Procedure, Rule 60; Massachusetts Rules of Civil Procedure, Rule 60; Minnesota Rules of Civil Procedure, Rule 60.02; Missouri Rules of Civil Procedure, Rule 74.06; Montana Rules of Civil Procedure, Rule 60; North Dakota Rules of Civil Procedure, Rule 60; Nevada Rules of Civil Procedure, Rule 60; New Mexico Rules of Criminal Procedure, Rule 1-060; North Carolina Rules of Civil Procedure, Rule 60; Ohio Rules of Civil Procedure, Rule 60; Oregon Rules of Civil Procedure, Rule 71; Rhode Island Rules of Civil

With regard to seeking relief from a judgment in the appellate courts by way of appeal, most states set a time period of a number of days, generally 30 to 60,[3] and allow a very limited extension of that time period, generally not to exceed 30 days, on a showing of "excusable neglect" (often the extension is had in the trial court rather than the appellate court). Some states require that the motion to extend be filed before the time period has run, but many do not, so long as excusable neglect is shown, and the time extended is not more than 30 days beyond the original time period required by rule.[4] I favor the latter approach. Excusable neglect is variously defined, some constructions more strict than others.[5] Let me say here that I think the better approach allows the motion to be made after the initial time period so long as within the extension period, and so long as the extension is not longer than the extension period set by rule. And I think the decision on excusable neglect should be with the Court of Appeals and not the trial courts.

The scheme for review of a judgment virtually everywhere in the country, then, is to allow a certain time period for appeal, to allow a late filing within a very limited period of time beyond the time set for a timely appeal on a showing of excusable neglect, with a "safety valve" allowing the trial court to grant a relief from judgment on specified grounds up to one year after the judgment is entered. But seeking appellate review of the judgment by filing a "delayed" appeal, even on leave, after the time period for taking an appeal of right—timely, or by way of brief extension on excusable

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Procedure, Rule 60; South Carolina Rules of Civil Procedure; Rule 60; South Dakota Rules of Civil Procedure, Rule 15-6-60; Tennessee Rules of Civil Procedure, Rule 60.02; Utah Rules of Civil Procedure, Rule 60; Vermont Rules of Civil Procedure, Rule 60; Washington Rules of Civil Procedure, Rule 60; West Virginia Rules of Civil Procedure; Rule 60; Wisconsin Statutes Annotated, 806.07; Wyoming Rules of Civil Procedure, Rule 60.

[3] See. for example, Alabama Rules of Civil Procedure, Rule 77; Colorado Rules of Appellate Procedure, Rule 4; Hawaii Rules of Appellate Procedure; Rule 4; Massachusetts Rules of Appellate Procedure, Rule 4; Supreme Court of Missouri Rule 81.04; North Dakota Rules of Appellate Procedure, Rule 4; New Mexico Rules of Criminal Procedure, Rule 12-201; Utah Rules of Appellate Procedure, Rule 4; Vermont Rules of Appellate Procedure, Rule 4.

[4] See footnote 3. Typical is this language from the Hawaii Rule, which appears in other jurisdictions as well: "The court or agency appeal from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past the prescribed time. Notice of an extension motion filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of the court or agency appealed from."

[5] See, for example, Kansas Statutes Annotated 60.2103(a); *Jenkins v Arnold*, 573 P2d 1013 (Kansas, 1978); *P.H. v People*, 814 P2d 909 (Colo. 1991); *Pioneer Inv. Services v Brunswick,* 507 US 380, 113 S Ct 1489 (1993); *Prizevoits v Indiana Bell*, 76 F3d 132 (CA 7, 1996).

neglect—has expired, appears to be, at the least, highly unusual. Relief is limited in at least the vast majority of states to a motion for relief from judgment in the trial court after this time, and on delineated grounds only.

Michigan has the same "safety valve" rule of allowing relief from judgment on delineated grounds up to one year after the entry of the judgment, but oddly—and in a way that "unbalances" the system in a way no other jurisdiction seems to do[6]—allows the party to simply go to the Court of Appeals raising any ground at all for that same one year. MCR 7.205(F)(3). And even the one-year limitation is not applicable under certain circumstances.[7] The party appealing need only give an explanation of the reasons for delay, which are to "considered" by the Court of Appeals in deciding whether to grant leave to appeal, there being no standard such as excusable neglect.

As it stands, then, MCR 2.612 and MCR 7.205(F) do not appropriately complement one another, as the motion for relief from judgment and rules regarding appeals of right do in the other states. 12 months is an extraordinary period of time in which to allow a party to seek appellate review from a judgment; one would think that the prevailing party would have some right to a sense of repose regarding the judgment if no action had been taken to appeal the judgment far sooner than one year. I support, then, the proposed changes.

A note on criminal cases. I note that several of the comments suggest that the proposals would work an extreme hardship on criminal defendants in guilty plea cases. For example, the Criminal Law Section of the State Bar comments that "As a practical matter, transcripts will not be available for plea cases until long after the new proposed deadlines have run, and it will be impossible to file a proper appeal based on the record." The State Appellate Defender makes much the same point. As I read the proposal, however, the defendant in a guilty plea case does not have 21 days from the judgment to file an application, but 21 days (which can be extended in accordance with the proposal) from the entry of an order denying a motion to withdraw guilty plea. And the rules allow *6 months* to file a motion to withdraw a plea of guilty. Surely the transcript will be prepared in plenty of time to file the motion---the rules allow the reporter 28 days (MCR 7.210(B)(3)(b)(ii))---and if there is a problem with timely production of these transcripts, that problem should be addressed, rather than having it drive time limits. The State Appellate Defender recognizes that the time for filing a guilty plea application under the proposal is actually 6 months plus the application time (plus the extension if properly sought and obtained), but makes the point that if the defendant "properly preserved a motion for plea withdrawal prior to sentencing or a guidelines challenge at sentencing, this claim should not be repeated in a trial court post-conviction motion in the same forum." First, I think the universe of cases where the motion to withdraw guilty plea preceded the motion to sentence is relatively small. In my experience, while this "universe" *does* exist, the vast majority of guilty plea applications do not concern cases where a motion to withdraw the plea was made before sentence. A rule thatallows the defendant to file the application

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[6] Again, the research done here is not exhaustive, but this appears the case.

[7] See MCR 7.205(F)(4) and (5).

after the denial of a motion to withdraw, and gives 6 months to make such a motion, handles the transcript problem, and makes the first line of decision in most cases the trial court, where the matter ought to first be resolved. And even in cases where a motion to withdraw plea *was* made before sentence, raising the matter again after sentencing, where support may be offered by reference to the transcript, and perhaps a more thorough analysis of the law by appellate counsel, offers a chance for the trial court to correct error. The same is true of motions challenging the sentence. That a challenge was made at sentencing so as to preserve the issue does not mean that a later challenge after the transcript has been prepared, and likely more careful consideration given to caselaw surrounding the scoring issue is paid, is inappropriate, and indeed such a challenge may be successful. I have certainly seen objections to scoring at sentencing be overruled, and then a later challenge brought in the trial court by appellate counsel, with supporting case law, succeed in correcting error (with no application then being necessary at all).

What if counsel in a criminal case simply "blows" the time limt? It is certainly true that indigent defendants should forfeit their right to appeal because of errors of their counsel, but where the time limit set by rule is missed because of counsel error MCR 6.248 requires reissuance of the judgment on such a showing, which would re-start the applicable time limit.

Various comments oppose any time limits on motions for relief from judgment; again, the federal system, and, it certainly appears to me to be at least most state jurisdictions, do not have eternal systems of post-conviction review, and the proposal here leaves open without time limit retroactive changes in the law and newly discovered evidence, requiring only that those claims be pressed with reasonable diligence; *one year* is given from the time of the recognition of a new right which might be retroactive, and is also allowed from the time which new evidence could have been discovered through the exercise of reasonable diligence. I would note that as to a "first" motion for relief from judgment, the existence of a one-year rule assists criminal defendants in preserving their ability to file federal habeas corpus petitions. A defendant has a one-year statute of limitations to file for federal habeas corpus, the time for which is tolled after the state direct appeal is final by the proper filing of a state postconviction motion (that is, in Michigan, a motion for relief from judgment under MCR 6.500 et seq). To *fail* to require a defendant to file his state motion for relief from judgment within one year of the direct appeal being finally concluded may lead a defendant into filing later than one year after his direct appeal is final, thereby forfeiting any attempt at federal habeas corpus. A one-year rule here is appropriate, is not onerous, and exists in other jurisdictions.

I thank the justices for their consideration of these comments.

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Very truly yours,

TIMOTHY A. BAUGHMAN
Chief, Research, Training, and Appeals